

A summary of the discussions at the Mining Charter 3 breakfast session, which was hosted by the Southern African Institute of Mining and Metallurgy (SAIMM) on

22 August 2017

by Mr Mpho Ronald Tlala, who convened and chaired the event

In opening the event, Mpho made the following statement based on the current status of the mining industry in South Africa.

'The mining industry is still an important contributor to the economy of South Africa. The finite nature of minerals makes them unique as compared to other industries and they constitute a revenue source for companies, governments, and citizens in resource-rich countries such as South Africa. There is an increased awareness that the efficient management of mineral resources can make the best use of the country's comparative advantage as well as to boost export earnings and revenue generation towards economic and social transformation. It is therefore important that the various stakeholders in the mining industry create platforms, such as this one today, to constructively engage on the status of the mining industry, proposed amendments and/or reforms on the mining laws and instruments such as the Minerals and Petroleum Resources Development Act (MPRD) and the recent revised Mining Charter 3 for the common good of our society.'



The three panellists, Mr Nic Roodt (Partner at Fasken Marteneau), Mr Otsile Matlou (COO: Practice Integration at Edward Nathan Sonnenbergs (ENSafrica's)), and Mr Warren Beech (Partner and Head of Mining at Hogan Lovells) each gave a high-level presentation on the recently revised Mining Charter 3, which was released by the Department of Mineral Resources (DMR) on 12 June 2017.

As part of the background and introduction to the breakfast theme, Mpho highlighted the evolution of the mining legislation framework in South Africa from pre-democracy starting with the Minerals Act (Act 50 of 1991), with the election of the democratic government in 1994 followed by the new Constitution of South Africa in 1996, thereafter the Green Paper on a Minerals and Mining Policy for South Africa in 1997, then the White Paper on a Minerals and Policy of South Africa in 1998, right through to the promulgation of the Minerals and Petroleum Resources Development Act (MPRDA) in 2004. Recognizing State custodianship of natural resources has brought South Africa in line with other major mineral producing countries of the world. While mineral potential is obviously a very important consideration in attracting the mining investments, the impact of government policies can be significant.

The number of changes to South Africa's mining laws over the last 20 years is staggering. For example, on 8 December 2014, changes were gazetted to the National Environmental Management Act, 1988 (NEMA) Environmental Impact Assessment (EIA) regulations, the long-awaited changes to the Minerals and Petroleum Resources Development Act, 2002 (MPRDA), which were referred back to Parliament on 16 January 2015.

The Mining Charter, as well as section 100 of the MPRDA, established the basis to review the Charter and its anchor legislation. In September 2010, the DMR released the Amendment of the Broad-Based Socio-Economic Empowerment for the South African Mining and Minerals Industry, which introduced sustainable development and mine safety and occupational health in line with the Mine Health and Safety Council (MHSC) milestones. On 12 June 2017, the DMR released the third revised Mining Charter.

In his presentation, Nic covered the legal status and implementation of the Mining Charter 2017. He referred to the Chamber of Mines' challenge on the revised Charter based on the following: *'the DMR cannot transform the Charter into an Act of Parliament, the Minister [is] implementing the Charter as if it is legislation and in particular, as if it forms part of the MPRDA.'* He also highlighted the Minister of Mineral Resources (DMR)'s response as follows, *'In his answering affidavit, the Minister for Mineral Resources alleges the following: there has been wide consultation; the Charter constitutes law; Section 47 of the MPRDA read with sections 2(d) and (f) give the Charter legislative force and the Charter is constitutionally justified as furthering the empowerment objectives in the MPRDA.'*

In his presentation, Otsile covered the following areas of the revised Mining Charter, namely: definitions, ownership, applicants, existing holders, sale of mining assets, financing transaction, Black Empowerment Equity (BEE) equity market, payment of 1% of turnover and employment equity. *In terms of ownership, in the Mining Charter 3, new BEE shareholding distribution requirements are as follows. BEE entrepreneur – 14% equity in the holder, Mine community – 8% equity in the holder, ESOPs – 8% equity in the holder, and total BEE shareholding – 30%. In the case of new right holders ('applicants'), the requirements for applicants for mining rights is a minimum 30% BEE shareholding and applicants for prospecting rights, black-owned companies to apply for new prospecting rights. In terms of Element 2.1.1.1 'A[n] [Applicant for] a new prospecting right must have a minimum of 50% + 1 Black Person shareholding which shareholding shall include voting rights, per prospecting right or in the company which holds the right.'*

In his presentation Warren focused on the responsibilities placed on original equipment manufacturers (OEMs) and service providers. *'Element 2.2, which considers the original equipment manufacturers (OEMs) and service providers, does not directly place obligations on them to the mining industry. However, in order for an OEM to manufacture and supply to its mining clients and provide services, the OEM will need to meet the requirements, including being a BEE-compliant manufacturing company and a South African-based company. A BEE-compliant manufacturing company in relation to procurement means a company that manufactures goods and has a minimum BEE Level 4 of the Department of Trade and Industry (DTI) Codes and a minimum of 26% black ownership. A South African based company is a company incorporated in the Republic of South Africa in terms of the Companies Act and which has offices in the Republic of South Africa. Mining clients of an OEM are required to identify all goods and services that will be required in their operations and must ensure that their procurement policies adhere to the criteria set out in element 2.2 regarding (a) mining goods, and (b) services.'*

The three presentations were followed by discussions in a format of questions and answers and input sessions. The topics included ranging from concerns on the consultation process; that is, consultation should go beyond information sharing. However, the Regulator need not necessarily agree with every stakeholder's inputs; ownership, such as 'once empowered, always empowered' and involvement of the communities and other stakeholders; job losses, mainly as a result of ongoing retrenchments and/or restructuring in most mining companies; growth; new mining projects; job creation opportunities; and ultimately to the sustainability of the South African mining industry. In his closing remarks, and in line with the African Mining Vision, he stressed the necessity of: 'Transparent, equitable, and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development'.

Mpho encouraged all the stakeholders, despite their often inherently different needs, to strive to make some trade-offs towards the sustainability of the industry, and consider the economic, social, and environment factors, for the common good of our society. ♦